THE

LAW RELATING TO

MERCANTILE AGENCIES,

BEING THE JOHNSON PRIZE ESSAY OF THE UNION COLLEGE OF LAW FOR THE YEAR 1886.

BY

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PREFACE.

MERCANTILE or commercial agencies are establishments which make a business of collecting information relating to the credit, character, responsibility, and reputation of merchants, for the purpose of furnishing the information to subscribers. These agencies have become recognized and permanent adjuncts to the world of trade and commerce. The community cannot do without them.

The responsibilities of these agencies are very great. Upon them the merchant relies for information. Character and credit depend upon the care with which they perform their duties. In many ways they are influences for weal or woe.

Recognizing the importance of their position in the commercial world, the author has thought that it would be a valuable contribution to the field of law literature to present in an accessible form the law relating to them. The aim of the author has been to prepare a treatise which should be of practical value alike to the lawyer and the student, to the merchant and the mercantile agency. He has constantly endeavored to bear in mind the needs of these parties and the points in which they are specially interested.

The principles supporting the decisions of the courts have been developed. Special attention has been given

to the statement of the facts in each particular case, in order to satisfy the practitioner who is always desirous of knowing upon what facts a decision is based. The principal points in the opinions of the courts have been presented, and it has seemed desirable to present them in the language of the judges. In short, the aim throughout has been to produce something which would be really useful to all parties in interest.

Much time and labor have been spent in collecting the materials for this work, and it is believed that all the cases on the subject, scattered as they are through many volumes of reports, are embodied in this treatise.

The task of preparing this little work has been to the author an interesting and instructive one. It has shown to him anew the elasticity of the principles of the common law and their power of adapting themselves to the varying demands of civilized life.

MERCANTILE AGENCIES.

HISTORY OF THE AGENCIES.

That there was a need for institutions of the nature of those under discussion is shown by reports of several cases in the English Reports prior to the establishment of Mercantile Agencies. In the years 1826 and 1827 we read of two cases reported in Carrington & Payne's Reports in which the defendant was a Mr. Foss, the secretary of "The Society for the Protection of Trade against Swindlers and Sharpers." It was the duty of the secretary to send to members printed reports for the purpose of denoting and signifying to the members of the society the names of such persons as were deemed and considered swindlers and sharpers, and improper persons to be balloted for as members of the society.

From the report of a case which came before the House of Lords in 1848 we gain some information in regard to the "Scottish Mercantile Society." The society had been formed of merchants and bankers, and its object was declared to be "To concentrate and bring together from time to time a body of information for the exclusive use of the members relating to the mercantile credit of the trading community, with the view of diminishing the hazards to which mercantile men were exposed."

The American system of mercantile agencies owes its origin to the work done by one Church, who was at first

a commercial traveller. On his business tours he was in the habit of making notes as to different persons. He had his notes for his own use. Other people knew of his notes, and would come and ask him for information. At last he was employed by about thirty New York houses to travel in the South and West to collect information for them. His labors suggested to Lewis Tappan the idea of establishing an institution which should make a business of collecting information concerning the responsibility, character, reputation, and credit of merchants, and which should furnish this information to interested persons who became its patrons. In an able article, written in defence of the system, published in Hunt's "Merchants' Magazine" for January, 1851, Freeman Hunt, speaking of Tappan's Agency, says: "Immediately after the terrible mercantile revolution in 1837, when our whole system of internal commerce was prostrated and nearly all its operations bankrupt, this agency was planned and put into operation, as a remedy for some of the difficulties which had just been so heavily experienced. Its design was to uphold, extend, and render safe and profitable to all concerned the great credit system on which our country had thriven, doing business to an immense amount with all the world, and using the capital of the world to do it with."

Before proceeding with our sketch of the growth of the American system of mercantile agencies, let us briefly consider the methods employed by business houses for ascertaining the standing of merchants prior to the establishment of these institutions. We are told that "they would get information as they could by correspondence or otherwise. Some of the larger houses employed travelling agents to look after and report debtors, and collect debts. Smaller houses were deficient in the information

so necessary to their success; the larger houses got it at too high a cost." A writer in the "Cyclopædia of Commerce," edited by J. Smith Homans and J. Smith Homans, Jr., and published in 1860, says: "A comparison of the system of 'The Mercantile Agency' with that of the 'Commercial Traveller,' which it superseded, is much to the advantage of the former, as regards the item of cost, as well as information. From a large dry-goods house we learn that in old times its expenses for travellers counted by thousands, and that it was, to a vexatious extent, in the power of clerks, who were anxious to make sales, and whose good opinion was too often won by civilities rather than by responsibility. Now it holds an efficient check upon its salesmen, who travel not to choose customers, but to make collections, and obtain orders."

It was to displace this system that Lewis Tappan, in 1841, established in the city of New York "The Mercantile Agency." Owing to the strong anti-slavery tendencies of Tappan, his house could not send men to the South, and was therefore compelled to limit its operations to the country north of Mason and Dixon's line. In 1842, six months after the establishment of "The Mercantile Agency," Messrs. Woodward & Dusenberry established "The Commercial Agency." They reported the entire country. In the year 1846 Benjamin Douglass became Tappan's coadjutor, and assumed the chief management. From this time the business grew rapidly, and assumed a permanent and recognized position among the mercantile institutions of the country. Subsequently Tappan retired from business, and the firm became Benjamin Douglass & Co. This firm was succeeded by R. G. Dun & Co. The Woodward & Dusenberry Agency subsequently became "The McKillop & Sprague Co.,"

and "The Tappan, McKillop & Co. Agency," being the two names by which the house was known in the East and West. This Tappan was some relative of Lewis Tappan. In 1878 this agency failed, and retired from business.

A few years after the establishment of "The Mercantile Agency" and "The Commercial Agency," J. M. Bradstreet established "The Improved Mercantile Agency," which was some years afterwards incorporated, and is known as "The Bradstreet Company."

The mercantile and commercial agencies were originally established for the purpose of reporting the credit of buyers throughout the country. It was Mr. Bradstreet who first published a book giving the ratings. The other agencies followed his example.

Among the recent features of the business may be mentioned the "Special Agencies" established during the past ten or twelve years, which confine themselves to reporting a particular line of business. Prominent among these are the agencies devoted to the furniture, stationery, jewelry, and hardware industries.

In England mercantile agencies are also known under the name of "Trade Protection Societies," and appear to have been established and developed independently of the American agencies.

The American establishments have branch offices in all the prominent cities of the United States and Canada, and have extended their operations to Great Britain, France, and Germany.

Without going into details as to the methods employed by these agencies, it may be said that the country is divided into districts; each district reports its own territory, and there is a daily interchange of information between

the districts. Correspondents are selected with the utmost care; in fact, everything is planned with the idea of securing the best results.

Thus these agencies, which were at first regarded as "partaking of the nature of a system of espionage seemingly at variance with that candor and love of open dealing so characteristic of our commercial usages," have gained the confidence of the mercantile world, and have demonstrated, by their careful and successful management, that they are necessary parts of the machinery of trade and commerce.

THE QUESTION OF AGENCY.

It is said that, in the early days of mercantile agencies, Charles O'Connor laid down for them the principles of the law under which they should act, and within which they would find protection. We do not know what those principles were, but we do know that experience in the courts has taught the community and the agencies what principles can be applied.

The mercantile agency is the agent of him who engages it to serve him. The contract signed by a subscriber to "The Bradstreet Company" agency reads as follows: "The undersigned hereby employs the Bradstreet Company to investigate and report," etc.

When the mercantile agencies first came into the courts, the judges recognized the fact that these establishments were new forces in the community, and they felt themselves called upon to assign to them their proper sphere. In Ormsby *vs.* Douglas,[1] Woodruff, J., in giving the opinion of the Court, discusses the question of

[1] 37 N. Y. 484.

agency as follows; "Laying out of view for the moment the circumstance that the defendant in this case made it his business to seek information in order to furnish it to those whose occasions and interest require knowledge of the standing and character of others who dealt or proposed to deal with them, it is clear that if the witness Benton, having procured a note to be discounted on the faith, in part, of the plaintiff's responsibility, or being about to do so, called on the defendant for information respecting his standing and responsibility, it was entirely lawful for the defendant to give him all the information which he had on the subject. It was in a just sense a duty which one member of the community owes to another for mutual protection and benefit, and the law will recognize it as such by holding it privileged.

"Information of the description referred to being important, there is no legal objection to the employment of an agent to seek and communicate it. And the agent may properly be paid for his time, labor, and expense in the pursuit of such information.

"If one merchant may employ his own private agent to seek and communicate such information,[1] there is no legal objection to the combination or union of two or more in the employment of the same agent. And as a consequence, if an agent may act for several, he may make the pursuit of such information his occupation, and receive from those who desire to avail themselves of his services and his knowledge acquired in such occupation a compensation therefor."

It was upon such reasoning that the courts recognized the mercantile agencies as new and necessary servants of the commercial world.

[1] 3 Denio, 110.

THE QUESTION OF PRIVILEGE.

"Good name in man or woman
Is the immediate jewel of their souls."

This is the sentiment which Shakespeare makes Iago express, and this is the feeling of the law. Recognizing the priceless value of character, the law throws about it the mantle of protection, and holds to the strictest accountability him who unwarrantably assails it.

The merchant also is protected, not only in his capacity as a member of society, but also in his character of merchant, and for any reflection upon his business, even though it does not affect his reputation as an individual, he is held liable who makes the same. "The law," says Odgers, in his treatise on the "Law of Libel and Slander,"[1] "guards most carefully the credit of all merchants and traders; any imputation on their solvency, any suggestion that they are in pecuniary difficulties, or are attempting to evade the operation of any Bankruptcy Act, is therefore actionable *per se*."

In Harman *vs.* Delany[2] the Court says: "The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person, and if bare words are so, it will be stronger in the case of a libel in a public newspaper which is so diffusive." Evidently the law is strict in guarding the reputation of merchants. But there are exceptions to the general rule. "Circumstances," says Odgers, on page 182 of the work above mentioned, "will afford an excuse for writing or speaking defamatory words whenever the occasion is such as to cast upon the

[1] P. 77. [2] 2 Str. 898.

defendant a duty, whether legal or moral, of stating what he honestly believes to be the plaintiff's character, and of speaking his mind fully and freely concerning him. In such a case the occasion is said to be privileged, and the employment of defamatory words on such privileged occasions is, in the interest of the public, excused."

According to Odgers, privileged occasions are of two kinds:—

1. Those absolutely privileged.
2. Those in which the privilege is but qualified.

"In the first class of cases," he says, "it is so much to the public interest that the defendant should speak out his mind fully and freely, that all actions in respect of words spoken thereon are absolutely forbidden, even though it be alleged that the words were spoken falsely, knowingly, and with malice." The testimony of witnesses, the utterances of legislators, governors, and the executive of the nation come under this head.

The second class of cases may be defined in the words of Selden, J., in giving the opinion of the Court in the case of Lewis *vs.* Chapman.[1] "The term *privileged*," says the Court, "as applied to a communication alleged to be libellous, means simply that the circumstances under which it was made were such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge." This definition is adopted by Cooley in his work on "Constitutional Limitations."[2] "The cases falling within this classification," says Cooley, "are those in which a party has a duty to discharge which requires that he should be allowed to speak freely and fully that which he believes, where

[1] 16 N. Y. 373.

[2] Pp. 532 *et seq.*

he is himself directly interested in the subject-matter of the communication, and makes it with a view to the protection or advancement of his own interest, or where he is communicating confidentially with the person interested in the communication, and by way of advice or admonition."

In his treatise on the "Law of Torts," Cooley, in defining the second class of privileged communications, says: "These are cases privileged, but only to this extent; that the circumstances are held to preclude any presumption of malice, but still leave the party responsible if both falsehood and malice are affirmatively shown." Under this head, according to Cooley, confidential communications between one and his professional adviser, whether legal, medical, or spiritual, are privileged. So are confidential communications between a principal and his agent in any matter pertaining to the business. In his work on "The Law of Torts,"[1] he says: "And where confidential inquiries are made concerning the character and conduct of servants, or the responsibility of tradesmen, and the like, by one having an interest in knowing, and of one who may be supposed to have had special opportunity in his own dealings or affairs to acquire the information, the answers are in like manner privileged. But if one makes it his business to furnish to others information concerning the character, habits, standing, and responsibility of tradesmen, his business is not privileged, and he must justify his reports by the truth." In his treatise on "Constitutional Limitations,"[2] he mentions answers to inquiries by one tradesman of another as to the solvency of a person whom the inquirer has been desired to trust as coming under the class of "privileged

[1] P. 217.

[2] P. ~~538.~~ 526

communications," but in a foot-note he says, "but the reports of a mercantile agency to its customers are not privileged."

Dr. Francis Wharton, in a note to the case of Trussel *vs.* Scarlett,[1] says: "If the limitations of confidence are thrown off by the agency, in other words, if it publishes to the world the information it collects, then it is liable in damages to parties whose character it disparages, or whose standing it impugns. On the other hand, if it confines itself to the confidential communication of such information to its customers, then, if it acts *bona fide*, and without malice or recklessness, these communications are privileged, and the defendant, if sued for a libel in making such communications, would be entitled to a verdict." If we understand Dr. Wharton correctly, he holds that communications made to subscribers are privileged, regardless of whether they are interested in the communication or not.

Is it not surprising to find that two eminent jurists have come to such opposite conclusions?

In the light of these opinions it seems necessary to examine the subject as thoroughly and as critically as possible in order that we may know how the law stands. Let us in the first place examine some important opinions of the courts which have a bearing upon this question.

In Toogood *vs.* Spyring,[2] Parke, Baron, says: "In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the

[1] 18 Fed. Rep. 214.

[2] 1 Cr. M. & R. 180.

discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within narrow limits."

In Harrison *vs.* Bush,[1] Lord Campbell, C. J., said: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable. Duty, in the proposed canon, cannot be confined to legal duties which may be inforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation."

In Gassett *vs.* Gilbert,[2] Bigelow, J., said: "A party cannot be held responsible for a statement or publication tending to disparage private character if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest, or that of another, provided it is made in good faith and without a wilful design to defame."

In Wright *vs.* Woodgate,[3] Parke, Baron, says: "The proper meaning of a privileged communication is only

[1] 85 Eng. Com. Law, 5 E. & B. 344.
[2] 6 Gray, 97.
[3] 2 Cr. M. & R. 573.

this; that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made."

In Cockayne *vs.* Hodgkisson,[1] Parke, Baron, says: "I have already said, that every wilful and authorized publication to the injury of the character of another is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication."

In Coxhead *vs.* Richards,[2] Tindal, C. J., said: "I do not find the rule of law so narrowed and restricted by any authority that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief and with reasonable grounds for the belief that it is true, will not be excused, though he has no personal interest in the subject-matter."

In Washburn *vs.* Cooke,[3] Bronson, C. J., says: "Bu in actions for defamation, if it appear that the defendant had some just occasion for speaking of the plaintiff, malice is not a necessary inference from what, under other circumstances, would be a slanderous charge."

It is from such words as these that we gain light in our investigations. It is from such statements of the law that the courts have been able to give a place and privilege to mercantile agencies. But to what extent

[1] 24 Eng. Com. Law, 5 C. & P. 543.
[2] 10 Jurist, 984.
[3] 3 Denio, 110.

they have gone in holding communications made by these agencies privileged, is another question. The cases upon this question are not numerous, and we have therefore deemed it best to present as fully as possible the facts in each particular case, and extracts from the opinions of the courts.

The case of Goldstein *vs.* Foss, *et al.*,[1] is the earliest case on this question. It was the duty of Foss, who was the Secretary of "The Society for the Protection of Trade against Swindlers and Sharpers," to send to members printed reports for the purpose of denoting and signifying to the members the names of such persons as were deemed and considered swindlers and sharpers, and improper persons to be balloted for as members of the society. Goldstein's name appeared on one of the circulars which was sent to members. This was held to be libellous, and was not protected as a privileged communication.

Fleming *vs.* Newton[2] came before the House of Lords in 1848. The appellants were the directors of the Scottish Mercantile Society and the printers to that body. The society had been formed of merchants and traders, and its object was declared to be "to concentrate and bring together, from time to time, a body of information for the exclusive use of the members, relating to the mercantile credit of the trading community, with a view of diminishing the hazards to which mercantile men were exposed." The third rule of the society was to the following effect: "The secretary shall collect from the general records of protests, hornings, and other records of diligences kept for Scotland at Edinburgh, the names

[1] 12 Eng. Com. Law, 2 C. & P. 252 (1826).
[2] 1 H. L. C. 362.

and designations of debtors in trade, and otherwise, appearing in these records. . . . The whole information so collected shall be printed and forwarded monthly, or oftener, as the general committee of directors shall think proper, to each member respectively." The fifth rule declared that "the information contained in the printed record, so forwarded to members, shall be confined to themselves for business purposes, and no member shall communicate or use such information for other purposes, under penalty of deprivation of membership." The society printed the information thus obtained in a book called "The Scottish Mercantile Society's Record." This book was known among the trading community as the "Black List." Newton had dishonored two promissory notes, and Miller, the payee, had them duly protested, and the protests registered according to the laws of Scotland. The society had taken a copy of the register, and Newton's name was about to be published in the society's book, which was a mere copy of the register. Newton applied for an interdict to prevent the publication, and it was decreed. On appeal the case came before the House of Lords. A number of points were discussed. On the question of publication and libel the Lord Chancellor said: "The appellants are engaged in mercantile affairs, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent and giving the information by means of printing. No doubt, if the matter be a libel, this is a publication of it, but the transaction disproves any

malice, and shows a legitimate object for the act done." Directions were given to the lower court to recall the interdict, with costs to the appellant. The decision in this case, allowing the society to publish Newton's name in its book, was based upon the fact that the society was merely copying from the public record.

A writer in the "Albany Law Journal"[1] says that, so far as he has been able to ascertain, the earliest case in this country is that of Billings *vs.* Russell,[2] tried before Dewey, J., at *nisi prius*. He is probably correct in this statement. In that case "the plaintiff was a merchant and the defendant the proprietor of the Boston 'Mercantile Agency.' The defendant had received from his agent, on what was supposed to be reliable authority, a report injurious to the credit of the plaintiff. This report had been read by defendant's clerks to regular subscribers to defendant's agency, who were interested in knowing the standing of the plaintiff. The report was incorrect and unjust. The court charged that if the defendant, as the constituted agent of a commercial house, upon the application of his principal, made inquiries at the proper places and under proper and reasonable guards, to insure accuracy and privacy as to the information thus obtained, and the information which he thus obtained was repeated *bona fide* to his employer, and to him alone, as the result of such inquiries, and for the purpose of governing his conduct in his business transactions with the party as to whom the inquiry was made, such communication may be justifiable as a confidential communication and the defendant would not be responsible, although the information was incorrect and unfounded in fact, the defendant acting in

[1] Vol. 8, p. 65.

[2] 8 Boston Law Reporter, 699.

good faith, and believing it to be true at the time he communicated it; but that the privilege of a confidential communication would be confined to the agent, and if the principal repeated it to others he would be responsible."

The case of Taylor *vs.* Church[1] came before the General Term of the Court of Common Pleas of New York in 1851. The jury had rendered a verdict for the plaintiffs of $6000 damages. An appeal was taken from the judgment to the General Term of this Court. The following is a statement of the facts in the case: Information respecting a firm doing business in a Southern State was communicated by the defendant to a person by whom he was employed for the purpose, and who was directly interested in ascertaining their credit. The information was then printed by the defendant and furnished in the course of his business to merchants having no immediate interest in learning the standing of the said firm, but who were in the habit of selling goods to persons in the Southern States, and wished the record for future reference. The defendant in this suit was the proprietor of what is now known as a commercial agency, and as such conducted a business which is described in the opinion of the court. He was sued by the plaintiffs for injuries to the credit and standing of their firm from a libel contained in the following words:—

"Taylor, Hale, and Murdock, Columbus, Miss.

"This concern does not seem to thrive here. M. is capable in some respects, but is not a successful manager. He is remarkably systematic and particular in details, and a superior office clerk, but lacks the other and more essential requisites of a good merchant. H. is

[1] 1 E. D. Smith's Rep. 279.

rather a negative character. Taylor resides in New York, and sends out undesirable, ill-assorted odds and ends and unsalable stock. He was formerly with Beri King, and I am told is an unprincipled character." The complaint alleges that the plaintiffs were merchants, and co-partners in trade at Columbus, Miss., at the time of the publication of the alleged libel; that the same was printed by the defendant of and concerning their firm, and circulated by him to and among divers merchants of and from whom the plaintiffs were in the habit of purchasing goods. The answer sets up that the defendant was engaged in ascertaining the credit and standing of merchants residing and doing business in the Southern and Southwestern States; that the publication was written by him at Columbus while in the discharge of his said duties, and forwarded to a mercantile firm at New York for the use of that firm and thirty-six other subscribers; that the plaintiffs were unknown to him at the time, and it was information he received which he deemed reliable; that it was printed for the more convenient distribution among said subscribers, and was a privileged communication. The proof was that the defendant sold and distributed it among others besides those subscribers. This was one of the early cases. Mercantile agencies were yet new to the community. The Court feels the importance of the occasion, and gives an elaborate opinion covering the whole question. We quote liberally from the opinion of Ingraham, First Justice, because his language is both interesting and instructive. He says: "This action is brought to recover damages for an alleged libel contained in a printed paper which was circulated by the defendant. The defendant was employed by certain merchants and mercantile firms to obtain and communicate intelligence in

regard to the standing and responsibility of merchants and others doing business at the South and West, and after obtaining such information he caused the same to be printed and distributed in loose sheets, and subsequently in a book, to such persons as became, or were at the time, subscribers to his agency. He was in fact the proprietor of an agency for giving information to such as were willing to pay for it in regard to the character and standing of Southern and Western merchants. In the course of such publication the article which is complained of as libellous was published concerning the plaintiffs. The business is one of recent date, novel in its character, and the questions which have been presented to us in this argument are important, not only to the parties immediately concerned, but to the mercantile community. That such establishments, properly conducted, and giving only correct information, are of the highest importance to those who require such communications, no one can deny; but it is also evident that if carelessly conducted, or if untrue reports are furnished, even through error or mistake, the consequence to those who are thus misrepresented may be very injurious, and sometimes destructive to their reputation, character, and credit. We have felt the importance of these considerations, both in regard to those who need the information, and also in reference to a continuance of such agencies, in the investigation of the questions before us."

Again: "The next inquiry is, was this libel a privileged communication? If it was, then it must be conceded that there is no ground upon which the verdict can be upheld. No special damage is shown, nor is any express malice proven. The subsequent report in 1847 could not be considered as furnishing such evidence. That publication would be equally privileged with the first, and

express malice is not to be inferred from a second publication of privileged matters, without some stronger evidence than the mere republication. If this publication had been in answer to an inquiry from a merchant having an interest in knowing the condition of this firm, and had extended no further than the form or answer to the application, it might be included within the protection of privileged communications.[1] It is not, however, necessary to the decision of this case that we should now decide whether, if the communication had been confined to the person making the inquiry, it would have been privileged. The publication was far more extended in this case."

Again: "The question then on this part of the case is, whether a communication made for the purpose which brings it within the class of those which are privileged, may be subsequently printed and circulated to other persons, who, at the time of the publication, have no interest in knowing the facts stated, and who purchase the work for the purpose of reference at a future period, if they should thereafter have occasion so to do. The benefit of this exception on account of privilege from the ordinary rule has never been extended so far, nor do I know of any case that warrants such a doctrine."

Again: "No case that has been cited protects a communication made for the mere purpose of profit, and to persons at the time having no interest in knowing, nor can such a rule be maintained upon principle. The only ground of privileged communication is interest, either in the party giving or receiving the information, but it is not to be found in a case where no such interest exists at the time the communication was made. Any ex-

[1] 3 How. 266, and 31 Eng. Com. Law, 5 A. & E. 535.

tension of the rule would be fraught with danger to that class of business men to whom credit is of any value."

Again: "As no one can guard against the effect of such secret publications, the least that can be required in regard to them is, to hold the party who, as a matter of profit, prints and publishes them, to the obligation of seeing that what he thus privately circulates is founded in truth. The convenience and protection of those who give credit is not to be considered as paramount to the credit and solvency of those who are the subjects of these reports. The rule which we would adopt in these cases is this, while any one who has an interest in giving or receiving the information has a right to claim that the same is a privileged communication, if made without malice, yet, when the publication is extended beyond the parties directly interested, its privileged character is at an end, and the man or firm whose credit is injured by such publication has a right to ask from the publisher full indemnity for the injuries sustained."

Again: "There can be no difference, as suggested on the argument, between making the communication in writing or printing. It may well be doubted whether either mode is justifiable if a third person is employed to do the work. If such a communication can be privileged, it must be made in a private manner; and if the defendant was justified in making it, he should have furnished the information himself, and not have committed the duty to others. It is not necessary, however, to decide this point. The view I have taken of the question whether the communication was privileged, renders it immaterial whether the copies were written or printed. The judgment must be affirmed."

This case came before the Court of Appeals in 1853.[1] The judgment was reversed on one point. As to the matter of privilege, Jewett, J., says: "I think the Court below was right in holding that the publication could not be included within the protection of privileged communications. In this case the communications were not even confined to the persons making the inquiries of the defendant. The libel complained of was printed by his procurement, and distributed by him to persons who had no special interest in being informed of the condition of the plaintiff's firm." When the formal question was put to the judges: "Was the alleged libel a privileged communication?" All the judges who heard the argument were of the opinion that it was not.

We wish to call special attention to the last paragraph quoted by us from the opinion of Justice Ingraham. He doubts whether third persons can be employed to do the work. He thinks "the defendant should have furnished the information himself, and not have committed the duty to others." This objection will again appear. In fact, the next case we shall mention was decided on that very point. We refer to the case of John B. and Horace Beardsley *vs.* Tappan.[2] This suit was tried before Judge Betts of the United States District Court in the city of New York. We have not been able to find any report of the proceedings in the District Court. It has, however, been our pleasure to see Mr. Douglass, who was at that time in Tappan's employ, and who was a witness in the case. We have not endeavored to obtain the details, but we are informed by him that the question involved in that case was as to whether those who established mercantile agencies could have clerks and correspondents

[1] 8 N. Y. 452.

[2] 5 Blatch. 497.

to aid them or not, and his statement is supported by the opinion of Judge Nelson, which we shall take the liberty of presenting verbatim. During the cross-examination of Mr. Douglass, he was asked whether Tappan had at the time of the alleged libel an agent or a correspondent in Norwalk, Ohio (the town in which the Beardsleys were established in business), and if so, who he was. Objection was made by Tappan's counsel, but was overruled. The question was then put. The witness declined to answer. Persisting in his refusal he was sent to Ludlow Street Jail for being guilty of contempt of court, and remained there for twenty days. The jury returned a verdict for $10,000. Mr. Douglass informs us that his determined refusal to answer the question put to him aided greatly in establishing the agencies in the confidence of the public, because men saw that they could give information to the agencies, and that these would not betray the confidence reposed in them. The judgment for the plaintiff in this case is, of course, an exception, and must be attributed to the fact that the courts and the public were not yet educated up to the needs and objects of the mercantile agencies. The case was taken to the United States Circuit Court, and Judge Nelson affirmed the judgment. His opinion shows the feeling at that time. He says: "The defendant resided in New York, and had established in that city a mercantile agency. . . . Defendant had some twenty clerks who participated in the business of the establishment, and who were, of course, privy to the information obtained, whether favorable or unfavorable to the character and credit of the country merchant, and who participated in the communication of the information to their customers or their customers' clerks. The defendant communicated through his clerks to several customers and to their

clerks facts seriously affecting the credit of the plaintiff's house; and the main question in the case on the merits is, whether or not he is exempt from the consequences of the publication on the ground of its privileged character. The Court charged the jury that if the defendant himself communicated the information to a person applying to him for the purpose in good faith, the communication might have been a privileged one, but that the publicity given to it by recording the libellous words in a book to which others had access, and to whom they were communicated, though standing in the relation of clerks, deprived the communication of its otherwise privileged character. This is no doubt a very important question, and one involving in its practical operation, whichever way it may be decided, interests of very great magnitude. On the one hand, to legalize these establishments in the manner and to the extent used by the defendant, is placing one portion of the mercantile community under an organized system of espionage and inquisition for the benefit of the other, exposed, from the very nature of the organization, to perversion and abuse; and, on the other, to refuse to legalize them, may be restricting injuriously the right of inquiring into the character and standing of the customer asking for credit in his business transactions. I am strongly inclined to think that if the establishments are to be upheld at all, the limitation attached to them by the court below is not unreasonable, to wit, that it must be an individual transaction, and not an establishment conducted by an unlimited number of partners and clerks. The principle upon which prvileged communications rest, which of themselves would otherwise be libellous, imports confidence and secrecy between individuals, and is inconsistent with the idea of a communication made by a

society or a congregation of persons, or by a private company, or a corporate body." On appeal the case was taken to the Supreme Court of the United States, and the judgment was reversed. The Court does not seem to have thought it necessary to touch on the question of privileged communications, but reversed the judgment on other grounds.[1]

Ormsby *vs.* Douglass[2] is the title of a case which was first tried in 1858 in the Supreme Court of New York City. It was a case to recover damages for slander. At the close of the plaintiff's evidence, the defendant moved for a nonsuit and a dismissal of the complaint, on the ground that the words spoken by the defendant concerning the plaintiff appeared to have been spoken confidentially, in the course of the defendant's employment, to one of his employers on the application of the latter, who had need of the information, for the purpose of governing his discretion in his business, and that under the circumstances the communication was not unlawful, there being no evidence of malice or bad faith. The Court granted the motion. A new trial was denied at the General Term, and the case was carried to the Court of Appeals.

Douglass kept a mercantile agency in New York City. By the terms of subscription, which constituted the contract between the defendant and the person to whom the alleged slanderous words were uttered, all information was considered strictly confidential, and furnished only for the use of subscribers, and was not to be communicated to any other person. In July or August, 1854, one Benton, a subscriber, who held a note endorsed by the plaintiff, presented a written call for information as

[1] 10 Wallace, 427.

[2] 37 N. Y. 484.

to the credit, responsibility, etc., of the plaintiff. The book was examined by the clerks, and after consulting defendant, and some objection by defendant to reporting in writing, because the report was bad, and a further conversation with Benton, the defendant stated that Ormsby was a man of no responsibility; he was a bad man, and worked for counterfeiters, and was a counterfeiter. Afterwards, in another conversation, after plaintiff's attorney had written a letter to the defendant, Benton asked defendant if he had made further inquiries, and the result, and he said he had, and that the report was not so much out of the way after all. He also stated that he had given the report to some four or five other persons. Miller, J., said: "It is said that the defendant falsely charged the plaintiff with a crime, and that the answer of the defendant to the inquiry made was not responsive to the question put. It is true that the report made embraced a charge of a criminal offence; but it was, I think, directly responsive to the question asked. It related to the standing of the party. It affected his responsibility as a business man and his financial credit and character. It had much to do with the question whether, as a business man, he was entitled to credit and confidence, and to what extent. It was in fact what the witness inquired for. . . . It was not an allegation or charge made by the defendant, but a report of information he had obtained in the due course of his business, and which had been entered upon his books. He merely communicated to a person, who had a right to demand it, such information as he had, including a fact within the range of inquiry made. Surely, if any communication of this kind made in good faith is privileged, then the whole is protected as much as any part of it, and it

cannot well be urged that there is malice because the whole truth is stated and a portion of it is criminatory."

Again: "If the alleged slanderous words were communicated to other persons besides the witness, the surrounding circumstances evince that it was in good faith and confidentially, to those who had a right to require it, and where it would be protected as a privileged communication."

Again: "The business in which the defendant is engaged is sanctioned by the usages of commercial communities, and the proof in this case fails to establish that he transgressed any rule of law in its transaction." Woodruff, J., from whose opinion in this case we quoted when treating of "The Question of Agency," after reviewing a line of authorities, says: "Upon the same general principle, merchants have an interest in knowing, and have a right to know, the character of their dealers and of those who propose to deal with them, and of those upon whose standing and responsibility, in the course of their business, they have occasion to rely. As a necessary consequence they may make inquiries of other merchants, or of any person who may have information; and if such merchant, or other person, in good faith communicates the information which he has, or thinks he has, the communication is privileged."

Again: "In my opinion the right of the plaintiff to recover does not at all depend on the question whether the defendant was pursuing this business for gain, but on the same principle as if he had been in the same business with the subscriber who applied to him and had made the same communication." The judgment was affirmed.

In the first volume of the "Albany Law Journal"[1] we

30 [1] P. 323.

find an account of a case which was tried in September, 1870, before the Chenango Circuit Court. It appears that one Gilbert received a letter with printed questions from J. M. Bradstreet & Sons' Mercantile Agency, inquiring as to the standing, character, and financial ability of a party by the name of Sherwood; and this letter he answered. Sherwood sued him for libel for matter contained in that answer. The Judge charged the jury that the communication was not privileged. It was ruled that the protection which is given to the proprietors of a mercantile agency in reporting the standing of a party to one of its customers (as laid down in Ormsby *vs.* Douglass) is not given to the country correspondent of the agency. It is strange that this case was not appealed by the defendant. If it was, we have not met it in our investigations.

The Commonwealth *vs.* Stacey[1] was a criminal action for libel, brought in 1871 against one Stacey, who was probably the Philadelphia representative of R. G. Dun & Co. The publication which was made the foundation of this indictment was as follows:

"Mercantile Agency; notification sheet, R. G. Dun & Co., proprietors. Thursday, March 3d, 1870. No. 9. Strictly confidential. Subscriber to reference book. We have information which changes the ratings of the undermentioned names. An indication that a change has occurred should be made in your book in all cases by making a dash (—) against your name. If specially interested in any of the parties, particulars may be obtained at our office. These notifications are confined strictly to changes materially affecting the ratings in our reference book. The insertion of a name herein does

[1] 8 Phila. 617.

not always imply a failure, but simply that circumstances have occurred, the particulars of which should be obtained by parties interested. Pennsylvania, 103, O'Brien & Cahill, shoes, Philadelphia."

This notification sheet had been sent to all the agency's subscribers. The indictment was demurred to, and the report details the opinion of the Court on the demurrer. The Court, Allison, P. J., says: "It is further assigned for demurrer against the bill that the matter set forth is on its face a privileged communication, made in the performance of an obligation and duty, being a confidential communication made by a mercantile agency to subscribers who employed the agency for the purpose of supplying them with information for their use in the management of their business. A communication is privileged, even though it be defamatory, where there is an interest or duty to make the matter complained of known, if it is done *bona fide* and without malice: Moore *vs.* Farrall,[1] Shipley *vs.* Todhunter."[2]

Again: "The indictment before us is founded on a communication made to only one member of the association, so far as we have information from the libel itself, and it would be a good defence to the charge of publishing a malicious libel, to show that the paper was sent to but one person, who was interested in knowing all that is stated, or referred to in the communication, as to the ratings of O'Brien & Cahill, and that the publication was without malice, the defendant having knowledge of such facts as warranted him in making the statement contained in the communication, or having reason to believe them to be true, made them to persons who were interested in obtaining the information. But we cannot

[1] 24 Eng. Com. Law, 4 B. & Ad. 871.

[2] 32 Eng. Com. Law, 7 C. & P. 680.

agree with the position taken by the defendant, that because he is connected with a mercantile agency he may communicate to every person who becomes a subscriber to his agency statements prejudicial to the business or moral standing of the merchants of the land, whether the persons to whom the information is sent have an interest in receiving it or not. In any case in which they have such an interest, and the agency have come under obligations to perform a duty of this kind, it would doubtless be regarded as a privileged communication if, without malice, facts are communicated which are necessary for the protection or proper for the information of the persons to whom they are sent. And this was the ruling of the court in the case of Lawless *vs.* Anglo-Egyptian Cotton & Oil Co.;[1] there every person to whom the circular was sent, having an interest in the business of the association, of which he was a member, was entitled to be informed of the transactions of the body, the publication of which was charged to be libellous. But can anything like this with fairness be claimed of an association whose members are scattered over all the land, but a small portion of whom can have any interest in knowing the ratings, as they are called, of the particular names which are periodically sent out with such remarks as are calculated to injure their reputation and business credit?"

Again: "There is no great hardship imposed upon an agency of this kind if they are required to know beforehand that their statements are true, and that the person to whom they are sent has an interest in receiving the information; and this could be accomplished by requiring every subscriber to furnish to the agency from

[1] L. R. 4 Q. B. 262.

time to time the names of the firms with whom they have established business relations, or who may have applied to them for credit." This ground of demurrer was overruled.

In 1871 the case of Sunderlin *et al. vs.* Bradstreet[1] came before the Court of Appeals. Sunderlin *et al.* were merchants doing business in the City of Rochester. Bradstreet *et al.* were the proprietors of the well-known "Mercantile Agency." One of their publications was a weekly sheet of corrections which was sent to their subscribers in the city of New York by private messenger, and in the country by mail. Between three and four thousand copies of their weekly sheet were so distributed. In this weekly sheet under the date of January 31st, 1868, they published that the plaintiffs had failed. This was confessedly false. The plaintiffs called upon the defendants for the names of the parties furnishing the information, which they refused to give, but published the next week a retraction of the report complained of. The jury had returned a verdict for the plaintiffs for $400. A new trial was denied at the General Term and judgment directed on the verdict in favor of the plaintiffs. It was then appealed to the Court of Appeals. The only question presented to the court by the appeal was: whether the communication came within the protection of privileged communications. Allen, J., declared that the case might be decided upon the authority of Taylor *vs.* Church, and spoke of the unanimous decision of the court in that case, seven judges taking part in the decision, the other judge not expressing an opinion because he was not present at the argument. He says: "The circumstances under

[1] 46 N. Y. 188.

which this judgment was given, as well as the method adopted by the judges in determining this precise question by a formal declaration, entitles the decision to peculiar weight as an authority. That case cannot be distinguished from this in any circumstance favorable to the defendant." In this case the court again defines the limits of the doctrine of privileged communications. Says Allen, J., "A communication is privileged within the rule when made in good faith in answer to one having an interest in the information, and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper that he should give the information."

In regard to the question of communications in cipher the Court say: "The fact that the libellous statement was in cipher is not material. It was in language understood by the numerous patrons of the defendant, and all the subscribers to the publication had the key to the cipher, and the publication was equally significant and injurious as if made in the distinct terms, in the very words, indicated by the numerical figures." The judgment was affirmed.

The State *ex rel.* Lanning *et al. vs.* Lonsdale[1] came before the Supreme Court of Wisconsin in 1880. This was a proceeding against the appellant Lonsdale, as for a contempt, to enforce a civil remedy. Lonsdale was the managing agent of the mercantile agency of R. G. Dun & Co. at Milwaukee. He had refused to answer certain interrogatories propounded to him when giving his deposition as a witness before a court commissioner

[1] 48 Wiscon. 348.

of Milwaukee County, in an action pending in the Circuit Court of Fond du Lac County, in which relators were plaintiffs, and one Lewis E. Reed defendant. That action was an action to recover damages for an alleged libel contained in a letter which it was charged Reed wrote and sent to some commercial agency in Milwaukee, giving an unfavorable report of the financial standing and responsibility of the relators. In obedience to a *subpœna duces tecum* Lonsdale appeared before the commissioner. Lonsdale, on being interrogated, refused to disclose whether the agency had received any such communication from Reed, or whether Reed was one of the correspondents of the agency, and also refused when requested to do so to produce any correspondence or documents called for by the subpœna. The ground of his refusal was that his answers to the questions propounded would have a tendency to accuse himself of libel, which is a misdemeanor, or to expose him to a penalty. As a result of his continued refusal, Lonsdale was adjudged guilty of contempt of court, and ordered to pay expenses and costs to the plaintiffs in the libel suit, and was committed to jail. From this order Lonsdale appealed.

The Court had to dispose of a number of questions presented by the appeal. On the question of privilege the Court, Lyon, J., says: "We do not think it proper to pass definitely upon the character of the communication which is charged to be libellous, or to say whether or how far it is privileged as respects Mr. Reed. These are questions which should regularly be determined in the libel suit. For the purposes of this appeal we are inclined to think that it was conditionally privileged in the hands of the appellant or his principals, and that they might lawfully make known its contents confidentially to their subscribers, seeking information of the

financial standing of the relators, provided they did so in good faith—that is, without malice, and in the belief that the statements therein contained were true. There is nothing in the record before us tending to show that the appellant has made known the contents of this communication to any person other than the subscribers of the agency, and the fidelity with which he has guarded and kept the secrets of the agency in this proceeding is strong evidence that he has not." The order was reversed.

Erber & Stickler *vs.* R. G. Dun & Co.[1] was tried in April, 1882, before Judge Caldwell in the Circuit Court of the United States for the Eastern District of Arkansas. It appeared in evidence that in the year 1880, and for some years prior thereto, Erber & Stickler were partners engaged in the mercantile business at Texarkana, in the State of Texas. It was and is the business of R. G. Dun & Co. to impart information to their subscribers orally on application therefor, and by means of a "daily notification sheet" printed and sent to their subscribers at the agency issuing such sheet. In the fall of 1880 reports injurious to the credit and standing of the plaintiffs were in circulation in Texarkana. One of the plaintiffs testified that these reports originated with one Kozminsky, another merchant and citizen of Texarkana. In time some statement of these reports reached the mercantile agency of R. G. Dun at St. Louis. In what terms these reports reached the agency at St. Louis was not very clear. Erber & Stickler contended that the reports made by Porter or some one else at Texarkana, and given out by the agency to its subscribers calling for the same were to this effect, viz: "Erber & Stickler

[1] 4 McCrary, 160.

are selling their goods below cost. They are about to fail. They have a bad business record. Their creditors had better be on their guard, and look after their claims." On the 13th day of December, 1880, the agency published the "daily notification sheet," on which appeared the names Erber & Stickler and residence, with the words "call at office" opposite thereto. This sheet was distributed to 600 subscribers, irrespective of their interest in the question of the plaintiffs' credit and standing. Dun & Co. denied that the words, "call at office," had any damaging meaning. Caldwell, District Judge, charging the jury, said: "It is indisputable under the evidence that whatever was said orally by the defendants about the plaintiffs and their business was said in good faith and in confidence to their subscribers, who were, by reason of their business relations with the plaintiffs, interested in knowing their financial and business standing, and in answer to requests made by subscribers in relation thereto, and without malice in fact. . . . These statements thus made by the defendants to their subscribers, in answer to inquiries in relation to the plaintiffs, are what the law terms 'privileged communications.'" . . .

As to the publication in the notification sheets the Court says: "These daily notification sheets were sent out by the defendants to all their subscribers in the city of St. Louis, numbering 600, irrespective of their interest in the question of the plaintiffs' credit and standing. This sheet was distributed to persons having no interest in being informed of the condition of plaintiffs' firm. This fact robs it of the protection of a privileged communication, and if it contains libel on the plaintiffs, the defendants cannot escape responsibility for such libel on the plea that it was a privileged communication." The

Court then tells the jury that at the present day it is his duty to define what in law constitutes a libel, and that it is the duty of the jury to determine whether the publication falls within the definition, or whether it is calculated to injure the reputation of the plaintiffs. Accordingly, he defines libel and says: "It is your duty to determine whether the publication of the 'daily notification sheet' containing the names of the plaintiffs, and opposite thereto the words 'call at office,' is a libel on the plaintiffs within this definition." He then discusses the evidence on that point. The Court was asked to instruct the jury that "no person other than the merchant himself asking for information, has in law a right to read, hear, or receive said words, and to him they can be communicated only by the defendants, R. G. Dun & Co., personally; and the reading of said words by any person in their employ by their permission, or the delivery of a written or printed statement containing said words by their employés, with their permission, to the clerks of a merchant subscriber requesting information concerning the plaintiffs, or to such subscribers, was an unlawful publication, not at all within or protected by the rule of law as to privileged communications." The Court discussed the instruction and its bearing upon the questions at issue at some length. "The merchants and other business men of the country," said the Court, "conducted their business to a very large extent through agents. A large proportion, if not all of the principal commercial houses of the country, employ commercial travellers, through whom sales are effected, credit extended, and collections made. In many of the houses there is what is usually termed the credit man of the house, whose special business it is to inquire in reference to the merit of all persons applying to purchase on credit, and who determines to whom

credit shall be given and the amount. The credit man of the house may or may not be a principal. It frequently occurs that he is a mere clerk or agent. Can it be sound law that a communication made to a principal in a house, to be by him immediately communicated to an agent of the house who conducts and controls the business to which such communication relates, is privileged, and that the same communication made directly to such agent is not privileged? It is also said that while such information is privileged if imparted by some member of the firm of R. G. Dun & Co., it is not so if imparted by a clerk or agent of theirs. If the business of the defendant is lawful, then it may be conducted by the same agencies that are lawful in the conduct of any other business."

"The distinction attempted to be drawn between the right to resort to the services of an agent in this business and other legitimate business pursuits, is not well founded. It is not in harmony with the known and universal methods of conducting business. Commercial and other business pursuits are conducted chiefly by partnerships and corporations, and the former often, and the latter always, can act only by agents; and any rule of law that would deny to them the right to avail themselves of the services of an agent in *every department of their business*, and for every legitimate purpose connected with it, is unsound. What a man may lawfully do by himself he may do by an agent. The distinction taken between a communication to a principal and his agent in the case of Beardsley *vs.* Tappan,[1] is too refined. It is not supported by reason or authority."

After disposing of this matter, the Court declares that

[1] 5 Blatchford, 497.

the real question is whether such communications made by a commercial agency like that conducted by the defendants are privileged in any case. "It is questionable," says the Court, "whether it is not pushing the doctrine of privileged communications beyond its legitimate scope to hold that a corporation or partnership whose business it is to collect information in regard to the standing and financial condition of business men which is imparted to subscribers for a money consideration, can invoke the doctrine of privileged communication for its protection. . . . . .

"The only case on the point decided by a court of last resort brought to our attention, is Ormsby *vs.* Douglass.[1] That case is on all fours with the case at bar, and in the *absence of opposing authority* on the question, we incline to assent to its reasoning and to follow it." The Court then quotes from the opinion of Justice Woodruff, and says that "it is worthy of remark that the author of this opinion was afterwards United States circuit judge for the second circuit, and Justice Hunt of the Supreme Court of the United States was also a member of the Court of Appeals at the time the case was decided and seems to have concurred in the opinion."

Trussell *vs.* Scarlett,[2] trading as R. G. Dun & Co., was tried in December, 1882, before Morris, district judge, and a jury in the Circuit Court of the United States for the district of Maryland. Trussell was a general merchant in business in Charlestown, West Virginia. In July, 1881, in Baltimore, Scarlett sent to William Devries a paper containing the following words: "Trussell, C. W., Charlestown, Jefferson County, W. Va., D. G.,

[1] 37 New York, 477. [2] 18 Feb. Rep. 214.

etc., July 11, 1881, has made an assignment for the benefit of his creditors. No particulars known as yet." The plaintiff wished to present the communication in evidence. Objection was made on the ground that it was a privileged communication. Evidence was then had as to its privileged character. Devries testified that the firm of William Devries & Co., of which he was a partner, was a subscriber to the mercantile agency of R. G. Dun & Co.; that when they first credited Trussell they made an inquiry of R. G. Dun & Co.; that they were apt to make one twice a year—every six months—may have made half a dozen during the year; that this paper, or a similar one, came to their office giving this information. Witness, upon being shown a ticket addressed to R. G. Dun & Co., asking information in regard to plaintiff and dated June 16, 1881, identified it as having come from his office, and upon being asked whether the paper received by him was not in answer to the inquiry contained in said ticket, replied: "I don't know. I should infer it was. We make inquiries every day in the week. We have an understanding with R. G. Dun & Co. that if anything occurs to any of our customers they are to immediately inform us." The communication was held to be a privileged communication and the evidence was excluded.

The Cincinnati "Commercial Gazette" not long ago published the charge of Judge Harmon in a libel suit against a mercantile agency which was tried in the Superior Court of Cincinnati and decided February 24th, 1886. The trial was quite lengthy, occupying two weeks. The jury returned a verdict for the defendant. The charge is an admirable statement of the law governing the question. The "Gazette" says: "Thirty-five years ago no judge would have given such a charge,

and no jury would have given such a verdict. The efforts to secure trade by sending out travellers, who frequently solicit patronage without regard to the fitness of the subject for credit, have made mercantile agencies a necessity, and the charge of the judge and the verdict of the jury are in keeping with the advanced ideas of the business community, which demands telegraphs, telephones, lightning express trains—in fact everything that will enable them to transact business securely and rapidly."

We have now presented all the cases which, so far as we have been able to discover, relate to the question of communications on the part of mercantile agencies. There has certainly been a development in the views of the courts. At first they seemed inclined to restrict the protection given to privileged communications to such as passed between principal and principal. Gradually they recognized the fact that through the needs of trade and commerce, and the rapid growth of the business of the mercantile agencies, new conditions had arisen which demanded recognition. The agencies were allowed the means of carrying on their work. They were permitted to have clerks and agents. Communications made by principals or agents of mercantile agencies to the merchant or his agents are now held to be privileged. The same principle would also protect the correspondent who has furnished information to a mercantile agency. Nor would it make any difference whether the communication which was privileged was made orally, in writing, or in print. The printer would be regarded as a necessary agent. In this respect there has been an advance since the dictum of the judge in Taylor *vs.* Church.

In Lawless *vs.* Anglo-Egyptian Cotton & Oil Co.,[1] Mellor, J., says: "I think that we should be going against the progress of the age if we were to hold that the necessary publication of the manuscript to the printer, from the fact that the directors, in making this communication to the great body of the shareholders, adopted printing instead of employing confidential clerks to write a letter to each shareholder, rendered the communication unprivileged."

The early tendency of mercantile agencies seems to have been to claim privilege for all communications to its subscribers irrespective of whether they were interested in the communication or not. The courts have held that communications made by mercantile agencies are privileged when made to subscribers who are interested in those particular communications. The fact that a merchant is a subscriber and is connected with the mercantile world, does not give the agency the right to communicate to him matters in which he has no present interest. This position the courts have steadfastly maintained. We therefore see no reason for saying with Judge Cooley, "that reports of a mercantile agency to its customers are not privileged;" nor can we hold with Doctor Wharton, who seems to draw the line of distinction between communications which mercantile agencies publish to the world and such as they publish to their subscribers, holding that the latter are privileged.

We do not know of any case which has been brought into the courts in which mercantile agencies have volunteered information to parties who were not subscribers, but such a case might easily arise. We believe that

[1] L. R., 4 Q. B. 262.

such communications would also be privileged. Odgers, in his "Treatise on the Law of Libel and Slander,"[1] says: "Where neither the defendant himself nor any one with whom he has confidential relations, is interested in the subject-matter of the communication, it is very difficult to define what circumstances will be sufficient to impose on him the duty of volunteering information to the prejudice of the plaintiff. There is no rule of law on the point. It is a question rather of moral or social ethics. . . . The jury must place themselves in the position of the defendant at the time these suspicious circumstances were brought to his knowledge, when first the question arose in his mind: 'Ought I not to inform A. of these matters which nearly concern him?' It may be that another man would have said: 'It is no concern of mine,' and would do nothing (which is always the safer course). But if the defendant honestly felt that he could not conscientiously allow A. to continue in secure ignorance, that he must communicate to him the rumor he had heard, and if he had reasonable grounds for so feeling, that is sufficient. It is not necessary that the reports which reach the defendant should be true, or that he should thoroughly investigate them. Hearsay is sufficient, reasonable, and probable cause in the absence of malice; unless the defendant ought, for any reason, to have known that his informant was unreliable and his story undeserving of belief. . . ." The law on this point cannot be better expressed than in the following passage found in the opinion of the Court, per Blackburn in Davies *vs.* Snead:[2] "Where a person is so situated that it becomes right, in the interests of society, that he should tell to a third person certain facts, then if he

[1] Pp. 212 and 213.

[2] L. R., 5 Q. B. 611.

bona fide and without malice does tell them, it is a privileged communication. The only difficulty is in any given case to determine whether it had or had not become right in the interests of society that the defendant should act as he did."

It has sometimes happened that subscribers, to whom information has been communicated, have informed parties concerning whom statements were made of the nature of the statements, and an action against the agency has been the result. In such a case it has been held that the agency may have a bill of particulars which shall specify to whom the statements complained of had been communicated. In this way the agency can discover the names of subscribers who have furnished the information upon which the suit is brought.

THE EFFECT OF REPRESENTATIONS MADE TO MERCANTILE AGENCIES.

It is the custom of mercantile agencies to send agents to call upon persons engaged in business and obtain from them a statement of their financial condition. Sometimes this is done because some subscriber is seeking information in regard to the party; sometimes because the agency wishes to be prepared in case of inquiries. The person does not know who it is that desires the statement, but he is well aware of the fact that some one is or may be interested in knowing about him, and that any representation he may make as to his financial condition will, in all probability, be relied upon by some one. The question which we now propose to investigate is, whether one who makes false representations to a mercantile agency is liable to a person to

whom the representations are communicated, and who, relying upon the same, suffers damage.

There are some interesting cases in which may be found the principles that can be applied here. The law holds him responsible who does any wrongful act which causes injury to another. The injury may be inflicted directly by one upon another whom he selects, or it may be set in motion by one and act upon a particular person not directly contemplated by the one doing the injurious act. The law holds that a man must be held to intend the consequences of his acts. This principle lies at the basis of the decision in the well-known cases of Thomas *vs.* Winchester,[1] and Scott *vs.* Shepherd.[1]

The legal maxim that "fraud is not purged by circuity" is also helpful to us in reaching and understanding the principles involved in this question.

In Eaton *vs.* Avery,[3] which is the leading case upon this subject, Rapallo, J., said: "The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned Judge before whom the trial was had, in his charge to the jury, wherein he instructed them that, if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Rig-

[1] 6 N. Y. 397.
[2] 1 Smith's Lead. Cas. 210.
[3] 83 N. Y. 31.

gins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by him, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof."

The Court then refers to a number of authorities, and remarks that "the principle of these cases is peculiarly applicable to the case of statements made to mercantile agencies."

Let us examine some of these cases, and see upon what principles the court bases its opinion.

In Morgan *vs.* Skiddy *et al.*[1] the defendants were held liable for publishing false and deceptive pamphlets and prospectuses, which they caused to be exhibited to the plaintiff, knowing them to be false, whereby the plaintiff, relying thereon, was induced to purchase some of the stock of the defendants' company. In this case the pamphlets and prospectuses were exhibited to the plaintiff, not by the defendants themselves, but by one Dalton, a trustee of the defendants' company.

In Newbury *vs.* Garland[2] it appeared that the defendant was connected with some company, and advertised falsely in regard to the resources and prospects of the

[1] 62 N. Y. 319.

[2] 31 Barb. 121.

company. By means of these representations, and through the agency of one Hamilton, he induced the plaintiff to take shares of stock in exchange for certain real estate belonging to the plaintiff. The shares turned out to be worthless. The Court, Endicott, J., said: "The doctrine of these cases, and of some others in the English courts to which I shall presently advert, is that a statement made to the public, and designed to influence the public, is designed to influence every individual who is interested in its subject-matter. If any person is induced to part with his property, or purchase that to which the statement refers, by what it contains, and which would naturally have that influence, the parties who have put it forth are responsible if it be false and fraudulent. . . . Wherever there is deceit, designed to injure, and consequent damage, the common law will give an action."

In Commonwealth *vs.* Call[1] the Court said: "A false representation, made to the agent of Parker, and communicated by him to Parker, upon which he acted, was, in legal contemplation, a false representation to Parker himself. It was designed to influence him, and whether communicated to him directly, or through the intervention of an agent, can make no difference. It was intended to reach and operate upon his mind. It did reach and produced the desired effect upon it, viz: the payment of the money. And it is immaterial whether it passed through a direct or circuitous channel."

In Commonwealth *vs.* Harley[2] representations were made to a clerk in the shop of the firm of G. B. Blake & Co., and were conveyed to a member of the firm. Partly upon these representations, and partly upon information obtained from other persons, the goods were sold to the

[1] 21 Pick. 515.

[2] 7 Metc. 462.

defendant. The Court instructed the jury on this point, that "if these facts were proved, it was sufficient to sustain the allegation in the indictment, that the said G. B. Blake & Co. were induced by said false pretences to deliver the said goods to the defendant."

In view of such authorities we think that the Court was right in concluding that "the case is a new one in its facts, but the principles by which it should be governed are well established."

In that case, the Eaton, Cole & Burnham Co. brought suit against one Avery for loss suffered by them through false representations as to his financial condition made to a mercantile agency. According to the plaintiff's evidence, it appeared that in August, 1875, a person employed by the mercantile agency of Dun, Barlow & Co. applied to Avery for a statement of the means of the firm to be reported to the agency, informing him of the object of his visit; that Avery stated the capital of the firm to be $20,000, chiefly contributed by him, in money, and gave further particulars. The employé reduced the statement to writing and afterward transcribed it on the books of the agency. Avery subsequently applied to Eaton, president of the above company, to sell his firm goods on credit. Eaton, before making the sale, sent to the office of the agency for information as to the responsibility of the firm and received an answer in writing, which gave the substance of Avery's statements These Eaton examined and he relied entirely on the report in making the sale. After the failure of Avery to pay, Eaton exhibited to him the statement, and he admitted the making of the representations therein. Riggins, Avery's partner, testified that Avery did not contribute any capital either in money or property; he (Riggins) had contributed tools valued at $4000, of

which Avery agreed to pay half, but did not. Avery, about the time he made the statement, advised him that he was going to the agency to put this property in the name and to the credit of the firm, and afterwards stated to him that he had rated the firm at $25,000. Judgment had been entered on a verdict. At the General Term it was affirmed and was then appealed to the Court of Appeals. It was affirmed in that court in November, 1880. "Proof was given at the trial," said the Court, "as to the business and office of these agencies, but they are so well-known and have been so often the subject of discussion in adjudicated cases that the courts can take judicial notice of them. A person furnishing information to such an agency in relation to his own circumstances, means, and pecuniary responsibility can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a wilfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured."

The question was raised in this case as to when a person is responsible for false representations made to one party which are relied upon and acted upon by a third party. The Court held that "if A. casually or from vanity makes a false or exaggerated statement of his pecuniary means to B., or even if he does so with intent

to deceive and defraud B., and B. communicates the statement to C., who acts upon it, A. cannot be held as for a false representation to C. But if A. makes the statement to B. for the purpose of being communicated to C., or intending that it shall reach and influence him, he can be so held."

The same rules apply here as in the case of representations made to parties directly. In order to render the fraud actionable it must appear that the representations were made as alleged, that they were made in order to influence the plaintiff's conduct, that the plaintiff relied upon them and acted upon them, that the representations were untrue, that the plaintiff suffered damage on account of the action he was induced to take, and that this damage followed proximately the deception.

In regard to the purpose of the defendant the Court said: "By making a statement of the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information, or whether he gave it on their application? He must have known that the object of the inquiry was not to satisfy mere curiosity, but to enable the agency to give information upon which persons applying for it might act, in dealing with the defendant's firm."

In this case it appeared that the agency, in reporting the statements of Avery to Eaton, added to its account of what Avery had said, the following: "We do not confirm his possession of so much means as he claims, though he has had opportunities to earn it. Claims to have contract for $25,000 worth of work at profitable rates. Their claims for credit are not yet established, and, for the present, small amounts should rule, though so

far have paid as agreed." This was followed by the usual statement that the information was communicated in the strictest confidence, etc. The report concluded with these words: "The actual verity of this or any other information obtained through the mercantile agency is in no manner guaranteed by the said agency or the proprietors thereof, for, notwithstanding every effort, mistakes and misapprehension may occasionally occur." The Court held that these cautions "related rather to the responsibility of Dun, Barlow & Co., for the accuracy of the information which they communicated, than to that of the defendant for the truthfulness of that which he lodged with them for the purposes of their agency;" but thought that the defendant was entitled to have the jury instructed that they might take into consideration whether the report made in the above form was such a statement as a prudent man would rely on.

A very interesting case on this subject, and one which deserves careful study, is the case of Macullar *et al. vs.* McKinley.[1] It was tried in the Superior Court of the city of New York. McKinley was a merchant tailor in the city of New York. The plaintiffs were merchants in Boston. On or about February 25th, 1881, an employé of the Bradstreet Company called on McKinley and told him that he came for the purpose of getting a statement of his financial condition. McKinley said, "Have a stock on hand of $2500, and no liabilities, as I pay cash for all my purchases." In May, 1881, Macullar, Parker & Co. began to sell goods to the defendant, through their travelling agent. Before extending credit to McKinley they made inquiries as to

[1] 49 N. Y. (Superior Court) 5.

his financial standing of the Bradstreet Company, to which they were subscribers. The agency's report to Macullar, Parker & Co. contained McKinley's statement of February, 1881. The defendant purchased several bills of goods in May and June from the plaintiff, for which he paid. In June, 1881, another employé of the Bradstreets called upon McKinley, and as a result of the interview he made a report to the agency, in which, referring to McKinley, he said: "He declines giving any information; he is believed to be working with his wife's money; is stated to have failed two or three times; regarded as of little responsibility, and jobbing houses in the city say they would sell him only for cash." The report was spread upon the books of the Bradstreet Company June 20th, 1881. It was put on file and distributed to those who inquired. It was not brought to the knowledge of the plaintiffs. McKinley bought goods in August, September, and October. In November he made a general assignment, preferring certain members of his own family, among others his wife, to whom he recited an indebtedness of nearly $1800, all borrowed before September, 1880, and $350 borrowed from other persons before February, 1881. His inventory showed an indebtedness of $4097.63, with assets of the nominal value of $2526.80, and actual value of $1553.80. An action was brought for damages for false representations made by the defendant in purchasing goods upon credit from the plaintiffs. The sales and credits on account of which this action was brought were those made in August, September, and October. The action was brought upon the representations made in February, 1881. The Court dismissed the complaint on the ground "that Bradstreet & Company were for the purposes of the trial the plaintiffs' agents.

The information which they communicated to the plaintiffs required the plaintiffs subsequently to ascertain whether they had received further information which qualified the former representations. The latter information, spread upon the books of Bradstreet & Company on June 20th, before any of these bills were contracted, was that the defendant was doing business with his wife's money and was of little or no responsibility. The plaintiffs were bound to ascertain whether there had been any change in the report to the agency or otherwise. In law the plaintiffs are chargeable with the knowledge of that further report made to their agents."

The case was appealed to the General Term of the Superior Court, and was argued before the three judges in December, 1882. Sedgwick, J., delivered the opinion of the Court affirming the judgment, and Freedman, J., concurred. Russell, J., dissented. The question raised in this suit is one of great importance. We have shown how Woodruff, J., in Ormsby *vs.* Douglass, justified the principles supporting the view that the mercantile agency was the agent of the subscriber. In this case we find the extent of the agency considered. In view of the importance of the subject we have deemed it best to present at some length the points touched upon by the Court. Sedgwick, J., refers to the opinion of the Court in the case of Eaton *vs.* Avery, and then says:—

"I wish here specifically to notice that in this declaration of what the law is, it is implied that the evidence must show that the defendant was the responsible cause of the plaintiffs relying on the statement. Of course this would be shown, in most cases, by the mere fact of the making of the representations when the defendant was proceeding to buy the goods. There might, however, be cases in which the representations were made

to induce one sale only, and yet the seller would be induced by the statements to make another sale at a future time, when the buyer would not be responsible for the operation of the seller's mind."

Again: "The plaintiffs were subscribers to the agency. It was not shown how often, as a habit, the agency applied to business men for information as to their means. As a fact in this case, the agency applied to the defendant for a statement of his financial condition in February, 1881, and again in June, 1881. Both statements were spread upon the books of the agency. What was done in this case it may be assumed was done in general as to all business men. Indeed, the methods of business men require that applications be made from season to season repeatedly. The profit or loss of each business season must cause a change of the financial condition at the beginning of the season, or the fact, that nothing has been made or nothing lost is an important piece of information. A just conclusion in my judgment is, that when the plaintiffs received the statement of February, they could not be justified in assuming that it was made by the defendant as something which he meant they should sell goods upon for all future time, but only for that space of time which, according to the custom of the agency, would elapse before another application be made and another statement procured. The defendant could assume that after the application in June the plaintiffs would act upon the custom of the agency, and giving no further operation to the first statement than it should properly have, would not act upon it, except in connection with the June statement. The defendant would be bound to know that the statement he made in February would be communicated to the plaintiffs, and would also have the right to believe that

they would learn of the statement in June. It was observed, in the course of the argument at the Bar, that the agency did not furnish the information it received to its subscribers always and uniformly, but gave it only to such of them as inquired for information. Nevertheless, it is true that the defendant would be liable for the February statement, on the ground that when he proposed to buy goods he would have convincing reason to believe that the plaintiffs, if subscribers to the agency, would apply to it. He must have the benefit of the consideration that his mind would work in a like manner upon proposing to buy goods after the second statement."

Again: "I therefore am of the opinion that it appeared, by undisputed testimony, that the plaintiffs were not induced by the defendant to rely upon the statement of February by itself, but upon it in connection with such further statement as in the usual course of the business would be made before August. The plaintiffs would learn, from the two coupled together, that the defendant refused to reassert the facts stated by him in February, and therefore did not claim any credit upon an implied assertion by him that his first statement still held good. The defendant had reason to believe that the plaintiffs had learned of the second statement, and were not about to rely upon the first statement. On either proposition the defendant was not liable, and the court made a correct disposition of the case."

Russell, J., acknowledges the general rule to be "that a principal is chargeable in law with information communicated to his general agent, or to his special agent in the course of negotiations relating to a particular business; but he cannot understand on what theory Bradstreet & Company can be regarded either as the general agents of the plaintiff, or as their special agents

with reference to the business transactions between the plaintiffs and their customers, so that information communicated to them can be held, in law, to have been communicated to the plaintiffs themselves."

"True," he says, "Bradstreet & Company were in a certain sense the agents of the plaintiffs," but he thinks that the extent of their agency was, that they agreed to furnish, *upon inquiry*, such information as they had in regard to the financial condition of persons in relation to whom their subscribers might desire to inquire."

This question will undoubtedly receive further consideration.

The latest reported case in which this question has appeared, so far as we know, is the case of the Genesee County Savings Bank *vs.* The Michigan Barge Company, T. W. Ferry and E. P. Ferry,[1] decided by the Supreme Court of Michigan during the October Term, 1883. This was an attachment suit in which it was claimed that the debt respecting which the suit was brought was fraudulently contracted. T. W. Ferry was the president and Andrew Thompson was the treasurer of the Barge Company. At some time, through one or both of these officers, the company procured a rating at Bradstreet's Commercial Agency as owning property worth $200,000, while the plaintiff's testimony strongly tended to show that the property was not worth more than $100,000, several of the witnesses putting it below $70,000. During the trial of the case in the Circuit Court an attempt was made to introduce in evidence the report made by T. W. Ferry to Bradstreet's agency, and upon which the plaintiff claimed to have relied and acted. Objection was made and sustained. Speaking of the statement made

[1] 52 Mich. 164.

to the mercantile agency, the Court, Sherwood, J., held that the circuit judge erred in rejecting the report. Quoting approvingly from the opinion of the Court in Eaton *vs.* Avery, the Court said:—

"We think a person furnishing information to a commercial agency as to his means and pecuniary responsibility, is to be presumed to have done so to enable the agency to communicate the same to persons interested for their guidance in giving credit to him, and so long as such intention exists, and the representations reach the persons for whom they were intended, it is immaterial whether they passed through a direct channel or otherwise, provided they were reported by the agency as made by the party.

"It is claimed the representations given by Ferry were in writing, and the plaintiff did not offer the original. The original was copied by the witness, and then it was handed back to Ferry. Plaintiff gave defendants' attorney notice to produce the original, which was not done, and Ferry was in Europe. Under the circumstances we think the testimony offered was proper, and should have been received."

LIABILITY OF MERCANTILE AGENCIES FOR FRAUD, BREACH OF CONTRACT, AND NEGLIGENCE.

It seems hardly necessary to consider the question of the liability of mercantile agencies in cases of fraud practised by them. It is well settled in English and American jurisprudence that fraud or deceit, accompanied with damage, is a good cause of action. When a party asserts a falsehood with a fraudulent design and damage results, he will be held responsible. Mercantile agencies are no exception to this rule.

Their liability under their contracts depends upon the wording of the same. They are liable to subscribers if they refuse to furnish information upon request. Then there is generally a clause to the effect that they will furnish information to the best of their ability. In case an action should be brought against them for a breach of this clause there would always be an interesting question for the jury.

We come next to the subject of negligence. Negligence is the absence of that degree of care which the law requires under certain circumstances. The law recognizes the fact that "circumstances alter cases," and therefore proportions the degree of care to be exercised according to the circumstances of a particular case. The general rule is, that when one is employed to do certain services for another, and there is no special contract on the subject, he assumes to exercise in the employment ordinary care and skill. If it can be shown that he has been negligent in the exercise of his employment, the law holds him responsible. This rule applies to mercantile agencies, and for any negligence on their part an action on the case can be brought.

An examination of the contracts entered into between mercantile agencies and their subscribers will show that the agencies are well aware of the delicate nature of their duties and the liability to commit errors to which they are exposed. They endeavor to relieve themselves of responsibility so far as the law permits. One thing they cannot do. The law will not permit a person to protect himself by contract against his own negligence. This question arose in the case of Roesner, Adm'r, *vs.* Herrmann.[1] The case was tried in the United States

[1] 8 Fed. Rep. 782.

District Court for Indiana in 1881. An agreement had been entered into between Herrmann and one Reed, an employé, by which, in consideration of the employment, Herrmann was released from all liability for damage in case of death or accident to Reed through his (Herrmann's) own negligence or that of co-employés. Gresham, D. J., held that such a contract was void as against public policy. "If there was no negligence, the defendant needs no contract to exempt him from liability. If he was negligent, the contract set out in his answer will be of no avail."

Tarling *vs.* Cooper, reported in the Law Times, is an instructive case. It was argued before the High Court of Justice, Queen's Bench Division. From the statement of the case in the Law Times, we conclude that a verdict for the plaintiff had been returned in the lower court and that there had been an appeal. The plaintiff was a wholesale clothier and ware-houseman, and the defendants carried on a business known as the "United Mercantile Agency." The defendants undertook to make all proper and necessary inquiries as to the mercantile status, respectability, and solvency of any person concerning whom the plaintiff might wish to have information, to report the result to the plaintiff, and in making such report to exercise due reasonable care and skill. The plaintiff was furnished with a status cheque-book, with directions on the cover to fill in the cheques with careful and accurate particulars of any person about whom he wished inquiries to be made. In October, 1878, the plaintiff requested information about a firm whose name he wrote as M. Lowe & Son, tailors in Swansea. The defendants searched their register, found nothing against M. Lowe & Son, but communicated with

a correspondent at Swansea, who reported to them, and they sent the following report to the plaintiff:

"Status report respecting M. Lowe & Son.

"Correspondent reports that it should be B. Lowe & Son; having been established several years, B. Lowe has only lately taken his son into partnership. Do not seem to be doing much business, and they seem to have ample stock. Considered safe for about £100.

"Signed COOPER & CRAIG,
"per H. M."

"This information is obtained from the best sources available, and is given in confidence, but no responsibility is undertaken on account hereof."

The information was correct as to B. Lowe & Son, the firm about whom the plaintiff meant the inquiry to be. He gave the firm credit, and they paid him bills for more than £100. Eventually, when in plaintiff's debt to the amount of £180, the firm failed, and it appeared that there was a bill of sale over all B. Lowe's property. This bill of sale was duly registered and was recorded in the defendants' books at the date of the inquiry. The plaintiff lost the value of the goods which he had supplied. The Court said that the defendants claimed to be protected from liability, even if they were negligent, by reason of the directions on the cheque-book and by using the words "no responsibility." They claimed that, if the negligence did make them liable, the plaintiff's contributory negligence absolved them. With regard to the point of no responsibility the Court held that it had recently been decided that this did not entitle the defendants to exemption or make it the less a contract by them to exercise the greatest care, and as to the question of contributory negligence it did not appear that the mistake of the plaintiff in writing M. Lowe &

Son instead of B. Lowe & Son had misled the defendants. There was evidence that the defendants had been guilty of negligence in not examining their books after the mistake as to the initial was corrected by their correspondent. The Court sustained the verdict.

The law holds the principal responsible for the acts of his agent done within the scope of his authority. This rule would also apply to mercantile agencies, did they not by their contracts relieve themselves from all responsibility for loss or injury caused by the neglect or other act of any officer, agent, or employé in procuring, collecting, and communicating information. The law permits persons to protect themselves by contract against the negligence of their agents. Common carriers, inn-keepers, and other persons engaged in the exercise of a public calling cannot do this. The exception in their case is owing to the fact that it is held that it would be against the public interests to permit it. But mercantile agencies contract in this way, and the law protects them. So it was held in the case of Duncan, Hale & Co. against Dun, Barlow & Co.[1] tried in 1879, in the United States Circuit Court for the Eastern District of Pennsylvania, before Judges McKennan and Butler.

Duncan, Hale & Co. had applied to the defendants at their offices in Williamsport and Philadelphia for information as to the standing, responsibility, means, and so forth, of one James Hill. The report communicated by the defendants, by their agents in Williamsport and Philadelphia, read as follows: "James Hill, commission merchant, Pittston, Pa., July 20th, 1876. Character, etc., good; capital in business $4000; owns real estate worth $10,000 and clear. Credit good." Relying upon

[1] 7 Weekly Notes, 246; 9 Central L. J. 151.

this information, Duncan, Hale & Co. sold and delivered to Hill goods to the value of $5110.30. It appeared that, on the day on which the defendants communicated the information to the plaintiffs, Hill was not the owner of real estate clear of incumbrances, and worth $10,000, but, on the contrary, was the owner of real estate all of which had mortgages thereon which were *duly recorded* in the county wherein the said real estate was situated, and that the said Hill was at the date of the sale and delivery of the goods insolvent. It also appeared that Hill was still owing $3009 to the plaintiffs. The written contract between Duncan, Hale & Co. and Dun, Barlow & Co. contained, *inter alia*, the following clauses:—

"The said proprietors are to communicate to us, on request for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States and Canada. It is agreed that such information has mainly been, and shall mainly be obtained and communicated by servants, clerks, attorneys, and employés, appointed as our subagents, in our behalf, by the said R. G. Dun & Co. The said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations, with which we, subscribers to the agency as aforesaid, agree to comply faithfully, to wit: . . . The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the servants, attorneys, clerks, and employés in procuring, collecting, and communicating the said information, and the actual verity or correctness of the said information is in no manner guaranteed by the said R. G. Dun & Co."

The defendants claimed that by the terms of the contract they were not responsible for the loss, since it was caused by the neglect of their agents. They asked for a nonsuit and obtained it. A motion was made to take it off. Upon the hearing the question of liability for gross negligence under the contract was ably argued on both sides. The Court, Butler, J., declared that the impression entertained at the trial had now deepened into conviction; that the language of the contract was broad enough to exempt the defendants from liability for all negligence of such agents, and was not confined merely to ordinary negligence. The Court also held that it was undisputed and clear that the negligence complained of, whether gross or otherwise, was the negligence of the agents and not of the defendants. The motion was refused.

The subscriber comes in contact with the agency when information is called for, and in response representations are made in regard to some person or persons. When, therefore, a subscriber complains of fraud, breach of contract, or negligence on the part of the agency, it must be in relation to such representations. We have laid down the rule that mercantile agencies are liable for any damage resulting from fraudulent representations, breach of contract, or negligence on their part. Let us now see whether this statement can pass without qualification. So far as fraud was concerned, there can be no question. When the law declares that fraud or deceit, accompanied with damage, is a good cause of action, it is simply applying a principle of natural justice. No statute adopted to protect people against fraud and perjury can be relied upon as a defence by him who has been guilty of fraud. But when we come to the question of breach of contract, or negligence, we may have to

qualify our statement so far as some of our States are concerned. We refer to those States in which statutes similar to that known as Lord Tenterden's Act have been adopted. It will be remembered that the fourth section of the Statute of Frauds provided, *inter alia*, "that no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." This clause was incorporated to do away with verbal guaranties. In the well-known case of Pasley *vs.* Freeman, in which Freeman was held liable for false representations as to the credit of one Falch, the Court held that the statute applied only to cases of contract, and established the doctrine that an action for deceit could be brought though the representations were only verbal. Pasley *vs.* Freeman was clearly within the mischiefs intended to be remedied by the Statute of Frauds. It was within the spirit, if not within the letter of the law. Lord Eldon condemned strongly the doctrine established in that case. He held that the statute would have to be applied to such cases, or a new statute would have to be passed. Twenty-seven years later, Parliament enacted, in the 9 Geo. IV. c. 14, s. 6, known as Lord Tenterden's Act, "That no action shall be brought whereby to charge any person upon, or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon [mistake for thereupon], unless such representation

or assurance be made in writing, signed by the party to be charged therewith."

Reed, in his treatise on the Law of the Statute of Frauds, declares that "the object of this enactment seems to have been to put misrepresentations in mercantile cases upon the same footing with guaranties. It has been so construed as to embrace every incorrect representation untinged by *fraudulent intent*, and no others."

Statutes similar to Lord Tenterden's Act have been adopted in Alabama, California, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Oregon, South Carolina, Vermont, Virginia, and Wyoming Territory.

Now, it is not difficult to see that this statute may affect the question which we have raised when we remember that the business of mercantile agencies consists wholly in making representations as to the character, conduct, credit, ability, and so forth, of persons. Let us suppose, for example, that an action is brought for the breach of a contract containing a clause to the effect that the agency will furnish information to the best of its ability, *i. e.*, make representations as to the credit, character, standing, etc., of persons to the best of its ability. Or let us suppose that an action on the case is brought on account of negligence. On the trial it appears that the representations are not in writing. Will the action fail? Is the statute applicable to this case? Let us examine the cases in which this question has appeared.

The first case in which this question was presented to the courts was the case of McLean *vs.* Dun, Wiman & Co.[1] It was tried before Moss, J., and a jury at the

[1] Upper Canada, 39 Q. B. 551.

Toronto Fall Assizes. Upper Canada has adopted Lord Tenterden's Act.

McLean was in June, 1875, a wholesale leather-dealer in the city of Toronto. By the terms of a contract between him and Dun, Wiman & Co., who were the proprietors of a mercantile agency, they agreed to furnish to the best of their ability information of the mercantile standing and credit of business men concerning whom the subscriber should make inquiries. McLean desired information in regard to one Ernest M. Wilson, who had applied to him to purchase about $500 worth of leather on credit. On the 10th of June he sent his clerk to the office of the agency, and the clerk, without giving any information as to the contemplated sale or its amount, made application upon a printed form furnished to him for the purpose by the defendants. According to the clerk's testimony, the defendants' clerk read to him out of a book that Ernest M. Wilson was the son of David Wilson; was formerly in partnership with one Phillips; that he had $10,000 of stock; that he had $5000 or $6000 in the business; that he claimed to be worth $7000; that he mostly dealt in United States goods; that his character and habits were good; that he was doing a fair trade; and that his credit was good locally. This information had been collected by the agency April 29th, 1875. The defendants' clerk admitted that he had given the plaintiff's clerk substantially the information which he had testified to, but denied that he gave any information to the effect that Wilson's credit was good locally. On the strength of this information Wilson in June obtained goods to the value of $524.17 on a credit of four months. Wilson was really insolvent at the time the report was made. In July he absconded from Canada. McLean sued Dun, Wiman & Co., charg-

ing that they had not exercised ordinary care and ability in ascertaining the mercantile standing, etc. of Wilson before making the report, but that they had wholly neglected so to do.

It was proved that on the steamboat City of Toronto Wilson had told a person that he was going to New York to buy goods and had $7000 with him. The evidence further showed that up to the time he absconded he had a good bank account; that he always had a good balance in his favor, and that he never required any discounts. There was testimony as to his habits of living, transactions as a business man, and so forth, which was not favorable to him. There was conflicting testimony as to whether he stood in good credit or not. It was shown from what source the defendants had obtained their information, and it was admitted that they had acted honestly and in good faith.

The plaintiff's counsel in opening the case admitted that the representations as to Wilson made by the agency were not in writing, and the defendants' counsel, claiming that a writing was necessary, moved for a nonsuit. The judge, although in doubt, allowed the case to go to the jury, reserving leave to the defendants, if necessary, to move to enter a nonsuit. The judge left to the jury certain questions, and on their finding entered a verdict for the plaintiff. A rule was obtained from the Court of Queen's Bench for Upper Canada calling on the plaintiff to show cause why the verdict should not be set aside, etc. The case was argued before the Court in August 1876. Several interesting questions were discussed, but we shall confine our attention to the opinion of the Court as to the statute and its relation to the case. The defendants claimed that, unless the representation or report be proved by writing, signed by

the defendants, there was in law no such representation or report as alleged; in other words, that it came within the words of the statute.

The Court, Harrison, C. J., admitted that the representation fell within the very words of the statute. "But," said the Court, "it is not enough for defendants in order to defeat the plaintiff's action to show that the representation is under the statute. The defendants must satisfy the Court in the language of the statute, either that the action is *upon* the representation, or *by reason* of the representation. The action here is no sense upon the representation. The action is for a breach of contract. . . . Where the foundation of the action is contract, although the declaration contain allegations of fraud or fraudulent representations, these need not be proved and may be struck out of the declaration as surplusage. If the contract were not proved in this case, and the plaintiff for remedy were driven to resort to the false representation, he would, we think, fail for want of the writing signed by the defendants, but the substance of his declaration is the contract, the duty arising from contract, and the breach of that duty. While Lord Tenterden's Act requires such a representation to be in writing signed by the defendant, there is no statute which requires such a contract to be in writing."

Morrison, J., concurred. Wilson, J., was not present at the argument, and took no part in the judgment. The rule *nisi* was discharged.

The case was appealed to the Court of Appeals for Upper Canada, and was argued before the Court in March, 1877, four judges being present. The principal question presented by the appeal related to the defence rested on the statute. Hagarty, C. J. C. P., agreed with

the court below. Burton, J. A., held that the statute was a good defence. Commenting upon Justice Harrison's opinion, he says: "Granting that the action is founded on the defendants' want of care in performing their contract, the plaintiff fails to show any right to recover the damages awarded, unless he proves the representation, and that he acted upon it. To do this he is driven to prove the representations given verbally to his clerk, and if the statute forbids this, his action to that extent fails. As before remarked, if the plaintiff did not furnish the goods in reliance upon such representation there is an end of the inquiry. He has sustained the loss through the confidence which he has mistakingly placed in the customer, and not by reason of his having relied on the representations of the defendant; but if he did part with his property in reliance upon the representations . . . can it be plausibly urged that it does not come within the very terms of the statute, and is therefore not receivable in evidence unless in writing, and signed by the defendant?" Patterson, J. A., said: "I see no difficulty in holding that the application of the statute is not excluded by the mere circumstance that the representation is made in pursuance of a contract which requires a true representation." Blake, V. C., said: "The injury in the present case arises from the defendants having given certain unreliable information to the plaintiff as to the credit of another, on which he acted, and whereby he has lost the amount for which credit was given. There was by the defendants a representation . . . made . . . concerning . . . the credit of a person to the intent or purpose that such other person might obtain goods or credit thereupon." He held that the statute clearly applied to the case, and that the only way in which its effect could be done away with would

be by adding a clause that it shall not apply to dealings with mercantile agencies. The appeal was allowed with costs, and the defendant in the appeal was given liberty to take a verdict for nominal damages, or a nonsuit.

The next case in which this question arose was the case of Sprague *vs.* R. G. Dun & Co.[1] It was tried in the Philadelphia Court of Common Pleas in 1878. The plaintiff, who was a druggist and a customer of the agency, inquired at its office in Mobile with regard to the credit and character of one Getz. He was informed that both were good, and was also shown a book in which Getz was described as possessing a considerable amount of real and personal property, and as one who might be trusted to any reasonable amount. The plaintiff had been for some time associated in business transactions with Getz, and was in the habit of raising money with his aid, and extending a like help to him. The plaintiff claimed that in consequence of the information received he was led to put his name to various accommodation notes which were also signed or indorsed by Getz, and discounted at the bank, and the proceeds divided between Getz and the plaintiff. Getz failed not long afterwards without having contributed his share to the payment of these instruments, which the plaintiff was compelled to take up, and the action was brought to recover damages for loss caused by the defendants' negligence. The plaintiff, when he made his contract with the agency, signed a stipulation that the information derived by him therefrom would be used exclusively for the "legitimate business of his establishment," and it was claimed as a defence that the floating of commercial paper was not a part of the legitimate business of plaintiff, and that the defendants were not liable for any loss

[1] 12 Phila. 310.

that might happen therefrom. A further defence was that the representation as to Getz's responsibility not being in writing, signed by defendants, was void under a statute of the State of Alabama, which is substantially the same as Lord Tenterden's Act. The plaintiff's counsel maintained that the statute did not apply to a case like the present, which, though worded in tort, had its origin in contract, and where a recovery may consequently be had for negligence in the absence of actual or constructive fraud.

The Court, Hare, P. J., held that the first ground of defence was tenable. As to the second ground of defence the Court said: "The question is not free from difficulty, but we incline to consider the plaintiff's interpretation as correct. It is an established rule that remedial statutes shall be read with a due regard for the object which the Legislature had in view, and this in the case of the act in question was not to relax the bonds of contract, but to guard against loose and unfounded charges of fraud—*modus et conventio vincunt legem*—and the agreement into which the defendants entered was a waiver of the right to take advantage of the statute.

"One who is under an express or implied obligation to keep his principal or employer well informed, is answerable not only for false statements, but also for not using due diligence to ascertain the truth and communicate it when occasion requires, and as the statute will not preclude a recovery on the former ground, so it should not be a defence to a suit brought on the latter. The criterion seems to be, is the alleged tort also a breach of contract for which a recovery could be had without proof of a *scienter*, although, where the circumstances are such that the defendant would be answerable

ex contractu, the case will not be within the statute, because the fault is so gross as to be equivalent to a fraud, or such as would have sprung from a fraudulent intent. . . . If the defendants mean to rely upon the statute, they should either make written communications to their subscribers or else inform them that they are not legally responsible for the truth of what they say."

With all due respect to the opinions of Harrison, C. J., Hagarty, C. J. C. P., and Hare, P. J., we think that the law is with the decision of the Court of Appeals for Upper Canada. It is not surprising that the judges have found some difficulty in settling the law applicable to these cases. The circumstances were new and startling. Here was a statute whose provisions were clear and distinct, but could this apply to a case in which one party had contracted to do certain services for another, and those services were of the very nature of those representations which the statute required to be in writing? Surely there was reason for concluding that the statute was either waived or did not apply to such cases. But Lord Tenterden's Act is an act which relates to the subject of evidence. To prove a breach of contract or negligence it is necessary to introduce in evidence the representations. This cannot be done unless the representations are in writing. The action would therefore fail. We shall therefore qualify our statement that mercantile agencies are liable for breach of contract and negligence, by saying that in those States in which Lord Tenterden's Act has been adopted, they could only be held responsible if the representations which they make to subscribers are in writing. In the States in which that act has not been adopted this rule would not hold good. The tendency, however, is to adopt in other States the requirements of the act, and for this reason this question is one of growing importance.

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